SUPREME COURT, U. S.

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1966~~ 115

MARK F. HELLER, *Petitioner*

vs.

STATE OF CONNECTICUT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

DAVID M. REILLY,
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OCTOBER TERM, 1966

No.

MARK F. HELLER, *Petitioner*

vs.

STATE OF CONNECTICUT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

Mark F. Heller, Petitioner, acting herein by his Attorney, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut.

OPINIONS BELOW

The judgment of the Seventh Circuit Court entered December 10, 1964 was rendered without written opinion. The opinion of the Appellate Division of the Circuit Court of the State of Connecticut entered November 10, 1966 (Appendix A, p. A-2) is reported in 24 Connecticut Law Journal #42. The

opinion of the Supreme Court of the State of Connecticut entered February 10, 1966 (Appendix A, p. A-1), appears in 24 Connecticut Law Journal, #34, and is not otherwise officially reported.

JURISDICTION

The judgment of the Supreme Court of the State of Connecticut, was entered on February 10, 1967 (Appendix A, *infra*, p. A-1). The jurisdiction of the Court is invoked under 28 U.S. Code 1257 (3), since the judgment of said Courts have infringed rights, privileges and immunities specially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

Whether defendant's rights, privileges and immunities under the Fourteenth Amendment of the Constitution of the United States and under the Sixth Amendment thereof were infringed when his request to consult with a lawyer made immediately upon his arrest was refused and as a result thereof defendant was deprived of a fair trial and prejudiced in his defense of the case by loss of the opportunity to:

1.) obtain legal advice as to the obtaining of evidence;

2.) loss of the opportunity to obtain the evidence itself due to delay caused by the refusal.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

". . . in all criminal prosecutions, the accused shall . . . have compulsary process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense".

STATEMENT OF THE CASE

On September 30, 1964 at 1:50 a.m., Cheshire Police Sergeant O'Leary found petitioner seated alone in his car, recognized him and asked him several questions. Petitioner gave the officer his license, was taken to Police Headquarters and refused to answer questions (including "who are you" and "what were you doing") without a lawyer. The defendant requested permission to call a lawyer while at Police Headquarters. Permission to call was refused by the police. Thereupon at 1:58 a.m. he was placed in a cell and told he was arrested under a charge of being found drunk. At 7:05 a.m. he was warned of his rights and allowed to call an attorney and released from custody. At no time during the evening was he offered a sobriety test. (R. pp. 15-16, Appendix pp. B-12 to B-18)

At trial, the sole witness for the prosecution, the arresting officer, stated that he detected a strong odor of alcohol on defendant's breath and that he was unsteady on his feet. The officer admitted that defendant requested permission to see a lawyer and permission was denied. Defendant testified in his own behalf that he was sober and produced a corroborating witness who had been with him earlier in the evening.

At trial, defendant made a claim of law that his rights under the Sixth and Fourteenth Amendments of the Constitution of the United States were violated and on the ground he was denied the right to counsel at the time of his arrest. (R. p. 17)

On the charge of having been found intoxicated in violation of section 53-246, the defendant was fined $20.00 and sentenced to 20 days in jail, execution suspended, in respect to the jail sentence. (Appendix p. A-10)

Defendant appealed to the Appellate Division of the Circuit Court which sustained the trial court's decision and overruled his claim that had he been permitted to obtain a lawyer events would have or could have led to the ordering of a professional examination to establish his sobriety holding that the defendant should have made such a request without a lawyer and holding further that the right to counsel is only a denial of due process where the defendant has made self-incriminating statements and that "denial of counsel is inextricably linked with the rights against self-incrimination guaranteed under the Fifth Amendment", and that therefore the defendant was not deprived of counsel so that the trial lacked the fundamental fairness essential to our concept of justice.

Defendant filed a petition for certification by the Supreme Court of Connecticut to review the decision of the Appellate Division. (R. p. 24)

The petition for Certification was denied without opinion February 10, 1967 by the Supreme Court of Connecticut.

FEDERAL QUESTION RAISED

Defendant's right to counsel based upon the Fourteenth and Sixth Amendment was raised at trial and a Motion to Dismiss was made by defendant upon the close of the State's evidence. The Motion was denied. (Appendix B, p. B-34)

Petitioner's claim was reasserted at the close of all evidence in argument which was not recorded but recognized in the Court's decision. (Appendix B, p. B-50, R. p. 17)

Petitioner's contention that his constitutional rights were violated were raised in the Appellate Court by Assignments of Error. (R. pp. 18, 19)

Petitioner's contention that his constitutional rights under the Fourteenth and Sixth Amendment because of denial of counsel was considered, discussed and denied in the opinion of the Appellate Court. (Appendix A, pp. A-8 to A-11)

Petitioner claims that his rights to a fair trial and to counsel were violated as guaranteed by the Constitution was raised in his Petition for Certification to the Supreme Court of the State of Connecticut and discussed by the respondent, State of Connecticut, in its opposition brief. (R. pp. 24, 28)

There was no opinion of the Supreme Court of the State of Connecticut.

Petitioner's federal claims were thus made at the earliest opportunity and were renewed at each stage of the proceedings below.

REASONS FOR GRANTING THE WRIT

The Court below has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court. In holding that the sole reason for obtaining counsel was for the protection of persons who might otherwise give incriminating statements *i.e.:* "the rule enunciated by the Supreme Court of the United States respecting right to counsel under the Sixth Amendment made applicable to the States through the due process clause of the Fourteenth Amendment, made clear that the denial of counsel is *inextricably* linked with the rights against self-incrimination guaranteed under the Fifth Amendment" . . . (opinion of Appellate Division, Appendix A, p. A-10), the Court has in effect held that the only prejudice to a fair trial that can result from denial

of counsel will occur only where a defendant has given an incriminating statement.

To hold that the present petitioner had no rights to counsel because he made no incriminating statement and can be deprived of property by a fine and deprived of liberty by a jail sentence would afford greater protection to a guilty man who gives statements in the absence of counsel without warning than it would to an innocent man denied the advice of counsel losing the opportunity to obtain the evidence without which he cannot overcome the testimony of an officer of the law.

This court has stated "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning".

Miranda vs. *Arizona,* 384 U.S. 436 at p. 474 16 L. Ed. 2d 694 at p. 723; 86 Sup. Ct. 1602 at p. 1628.

The case of *Schmerber* vs. *California* is not controlling. This Court therein stated: "No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented".

Schmerber vs. *California,* 384 U.S. 757 at p. 766; 86 Sup. Ct. 1826 at 1833; 16 L. Ed. 2d 908 at p. 917.

The claim here is that Petitioner was deprived of counsel's ability in respect to his right to obtain witnesses in his favor and particularly an expert capable of performing a blood test.

The fine and the jail sentence imposed in this case are neither large nor long but they are nevertheless a deprivation of property and liberty. Either the police officer was telling the truth and the defendant was guilty or, the defendant was sober and the arrest was wholly unjustified. The assertion of a constitu-

tional right may be a source of irritation to some police officers, as may be a series of arrests without convictions on petty charges. The record is not lacking in sources of such potential irritation. We note the officer in this case recognized the defendant and having his driving license asked him "who are you?" (Appendix B p. B-7).

A defendant should not be deprived of constitutional rights merely because the ultimate fine or jail sentence seems small.

It is common knowledge that alcohol does not stay in the blood for long periods of time. The evidence necessary to prove innocence could only have come from a blood test, promptly made in light of the fact that defendant's testimony and that of his friend were insufficient to overcome the only other testimony in the case.

The defendant's claims that had he had the opportunity of obtaining advice of counsel which would or could have led to the obtaining of evidence by blood test or other means which would have conclusively proven his innocence cannot be criticized by a counter-claim that there was no evidence this would have been the case.

The opportunity for demonstrating the truth of the statement was lost when the opportunity to consult with counsel was not promptly afforded and when the opportunity to obtain a blood test was not offered. It is also not an answer to claim that if the defendant wanted the examination of his blood, he had only to ask for it and to assume that such a request would have been granted when a request guaranteed by the Constitution was denied. It would be an equal answer to assert that anyone can claim the Fifth Amendment without a lawyer.

In all cases pending before this Court where a timely request for counsel has been demanded by a defendant who was there-

after prejudiced in the defense of this case, the Court has reversed conviction. The Constitution is just as concerned with the right of the innocent to obtain evidence as illustrated by the language of the Sixth Amendment "the accused shall . . . have compulsory process for obtaining witnesses in his favor".

The federal Constitutional question is of importance in the administration of justice. If the question presented by this case has not already been answered by *Escobedo* and *Miranda* then it is a question which this Court should answer because the right to counsel may be recurring question of critical importance to a defendant who would otherwise lose the opportunity of discovering evidence in his favor by passage of time.

CONCLUSION

For reasons stated it is respectfully submitted that this Petition for Certiorari be granted to protect the right of the accused to obtain counsel.

Respectfully submitted,
DAVID M. REILLY,
DAVID M. REILLY, JR.,
Attorneys for Petitioner.

APPENDIX A

PART ONE

Decision of the Supreme Court of the State of Connecticut

STATE OF CONNECTICUT *vs.* MARK F. HELLER

The petition by the defendant for certification for appeal from the Appellate Division of the Circuit Court is denied.

David M. Reilly, Jr., in support of the petition.

William Mark, special assistant prosecuting attorney in opposition.

Submitted January 16 — decided February 10, 1967

Connecticut Law Journal
Vol. XXVIII, No. 34, p. 4

PART TWO

Decision of Appellate Division
of The Circuit Court

Date of Judgment
November 4, 1966

Decision Announced
November 10, 1966

STATE OF CONNECTICUT
vs.
MARK F. HELLER

File No. CR 7-6573 AP

Appellate Division of the Circuit Court

Argued June 13, 1966 Decided November 4, 1966

Information charging the defendant with the crime of being found intoxicated, brought to the Circuit Court in the seventh circuit and tried to the court, *Reinhard, J.*; judgment of guilty and appeal by the defendant. *No error.*

David M. Reilly, Jr., of New Haven, for the appellant (defendant).

William I. Mark, assistant prosecuting attorney, for the appellee (state).

KOSICKI, J. At the time of his arraignment on an information alleging a violation of § 53-246, in having been found intoxicated, the defendant pleaded not guilty and elected to be tried to the jury. The request was denied (*Matzkin, J.*) and no exception to the ruling was taken. The court concluded that § 51-266 provided that there shall be no right to trial by jury in criminal actions where the maximum penalty is a fine of $50 or a jail sentence of thirty days or both. Under § 53-246, the maximum penalty that can be imposed on a person found guilty of being found intoxicated is a fine of not more than $20 or a jail sentence of not more than thirty days.

The defendant was then tried to the court and found guilty. The sentence imposed was a fine of $20 and a jail sentence of ten days, on which latter sentence execution was suspended. Appeal was taken both from the ruling denying a jury trial and from the judgment entered on trial of the issues of fact.

The defendant requested a special finding, which was filed, on the question of his right to a jury trial, and, on appeal, he made this the subject of a separate assignment of errors. He also filed assignments of error attacking the finding of the court before which the case was tried and claiming various errors including that of denial of trial by jury. The procedure followed is not in accord with our practice. Only one finding and one assignment of errors, containing all errors claimed to have been committed during the entire course of the proceedings, were sufficient to protect the defendant's rights on appeal.

In the ordinary case, not involving a serious crime and imposing a substantial penalty, where the defendant, after his preliminary motion or demurrer has been overruled, enters a plea of not guilty and proceeds to trial, he is precluded from pursuing on his appeal any error claimed in the overruling of his demurrer or such motion. We shall however adopt the course

followed by the court and the parties because both in the special finding and principal finding, the question of constitutionality of § 51-266 has been raised and pursued throughout the action and on appeal. *State* vs. *Sul*, 146 Conn. 78, 83.

The defendant asserts that the statute is violative of article first, §§ 9 and 21 (now §§ 8 and 19) of the constitution of Connecticut and of the sixth amendment of the constitution of the United States as guaranteed by the fourteenth amendment. His specific claims are that at the time of the adoption of our original constitution in 1818 an accused was entitled to a trial by jury. He bases his claim on a provision of the Statute Laws of Connecticut of 1808, Title L 11, p. 241, which penalized a person being found drunken and convicted thereof by the imposition of a fine of $1.34, and, upon failure to satisfy the fine, to be set in the stocks, there to remain not more than three hours nor less than one hour. From this the defendant argues that our constitution of 1818 guaranteed a jury trial where a penalty of a day or more could be imposed.

This is a nonsequitur. With the adoption of our original constitution in 1818 all forms of criminal punishment prevailing in colonial times, excepting fine, penal confinement or death, were terminated. The stockade, the whipping post and branding with the scarlet letter (if resort to the last ever was recognized in Connecticut) had disappeared in a resurgence of a respect for the dignity of mankind and inviolability of the person.

The rule preserving the constitutional right to a jury trial has been settled in both the state and federal jurisdictions. Concisely stated, there is no constitutional right to a trial by jury unless such right existed at the time the constitution was adopted. In the case of *McGarty* vs. *Deming*, 51 Conn. 422, 423, the claim made here was precisely answered. The court said: "A party accused of drunkenness had no right to a trial by

jury when the constitution was adopted. As the law then was he was tried by a justice of the peace without a jury, and with no right of appeal. Stat. 1808, p. 231. Hence the constitution does not in such cases secure a right to a jury trial. Besides, it may be a question whether this offense does not fall within the police powers of the state, so that the legislature may regulate the trial and punishment thereof as it pleases." See such cases as *Swanson* vs. *Boschen*, 143 Conn. 159, 162; *In re Clayton*, 59 Conn. 510, 519; *LaCroix* vs. *County Commissioners*, 50 Conn. 321, 327; *Seeley* vs. *City of Bridgeport*, 53 Conn. 1, 2; *State* vs. *Worden*, 46 Conn. 349, 365; *Curtis* vs. *Gill*, 34 Conn. 49, 54. For a review of the origin and history of and the right to jury trials reference is made to *State* vs. *Gannon*, 75 Conn. 206, 226-232; *U.S. Fidelity & Guaranty Co.* vs. *Spring Brook Dairy*, 135 Conn. 294, 297-299.

Neither is there any right to a jury trial to which the defendant is entitled under the sixth amendment to the federal constitution. "There is no common law in the United States distinct from the common law which each state has adopted for itself and which it applies as its local law subject to such alteration as may be provided by its statutes." 15 Am. Jur. 2d, National Common Law, § 4, p. 799. In the District of Columbia, the government of which is by act of Congress the common law that prevails, is that which was in force in Maryland at the time of the cession of that part of its territory now comprising the District. 24 Am. Jur. 2d. District of Columbia, § 11, p. 132. There is no right to a trial by jury under the federal constitution for petty offenses, as may be defined by statute, unless such right existed at common law antecedent to the adoption of the state constitution or the offense is so grave as to be comparable to offenses recognized at common law, to entitle the defendant to a trial by jury. See *District of Columbia* vs. *Clawans*, 300 U.S. 617, 624-627, 57 Sup. Ct. 660, 81 L. Ed. 843,

846-847; *District of Columbia* vs. *Colts*, 282 U.S. 63, 51 Sup. Ct. 52, 75 L. Ed. 177. The defendant's second "special" assignment of error (par. 9 of the assignment of error) is without merit. It is, therefore, unnecessary to consider the first assignment as to whether the claim just discussed was available to the defendant in the absence of an exception by him to the court's ruling denying a jury trial.

After the defendant had moved to correct the court's finding, the trial judge made a number of corrections and additions to the finding of facts, the conclusion reached, and a statement on a ruling of law made at the trial. The further corrections sought by the defendant are not warranted. They were neither admitted nor undisputed facts and we cannot enter upon the fruitless task of examining what credibility the trial court should have accorded to disputed testimony.

The needful facts found by the court can be briefly stated. On September 30, 1964, at 1:50 a.m., the defendant was found by Sergeant O'Leary of the Cheshire Police Department. He was seated in the driver's seat in a car parked at the side of a public street and partly occupying the traveled portion. The car had new dealer's plates and the lights were off. The sergeant placed his car in such position that its headlights shone directly at the windshield of the parked automobile. He then walked up to it and recognized the person in it as the defendant, whom he had seen several times in Cheshire and had arrested him on a prior occasion. He asked the defendant several questions about his presence there but received no reply. He detected a strong odor of alcohol on the defendant's breath. When, at the sergeant's request the defendant got out of his car, he was unsteady on his feet and, in an off-balance lunge, moved about fifteen or twenty feet toward the rear of the car. The sergeant then told the defendant to get into the police cruiser and he was taken to the police station a short

distance away. There he was presented before the desk officer. He was still unsteady on his feet, smelled strongly of liquor, his clothing was disarranged, he was violent in protesting routine police investigative procedure, and refused to answer any questions put to him. The police were unable to complete their preliminary investigation, which also involved the ownership and registration of the car that had been occupied by the defendant, and at 1:58 a.m. placed him in a cell after telling him that he was found intoxicated. During his questioning by the police, he offered no answer or statement; he remained silent. He indicated that he would answer questions if he could call a lawyer. The request was not granted. No further inquiry or investigation was pursued and no statement of the accused, either inculpatory or exculpatory, was obtained from him or offered on trial. Ten minutes after the defendant had been placed in a cell, the sergeant, having received information concerning the registration from the motor vehicle department, went to speak to the defendant. He found him asleep. He called the defendant's name several times without response. The defendant wakened at 7:05 a.m., signed a form to the effect that he had been warned of his right to counsel, to remain silent, and to be free on bail. Approximately ten minutes later he telephoned his attorney.

The defendant claims various errors on the part of the court in nine paragraphs of his assignment of errors. The last assignment, as to his right to a jury trial has been disposed of above and requires no further consideration. As to the remaining paragraphs of the assignment the defendant has failed to comply with the requirements of Practice Book §§ 989 and 990 and Form 819B. The allegations that the findings and conclusions of fact (par. 1) "were against the weight of evidence and were founded on testimony that did not rebut facts that show such conclusions are not beyond reasonable doubt," present no issue of law or fact which we can review. To do so we would

have to retry the case which is not within our province. *Morse* vs. *Morse*, 128 Conn. 138, 139. We find that the facts were not found without evidence; weight and credibility were the function of the trial court to decide. *Krulikowski* vs. *Polycast Corporation*, 153 Conn. 661, 668. The second assignment is without merit.

The court concluded, both as to fact and law that the defendant was found intoxicated by Sergeant O'Leary and, upon the subordinate facts in the finding, made its ultimate finding of guilt beyond a reasonable doubt. We have examined the entire evidence to determine the correctness of the court's ultimate conclusion and have given consideration to the finding for the purpose of determining the specific facts found by the court on conflicting evidence. *State* vs. *Hodge*, 153 Conn. 564, 572; *State* vs. *Foord*, 142 Conn. 285, 286. There was ample evidence, supplemented by inferences the court could have reasonably drawn, to justify its conclusions. *Katz* vs. *Martin*, 143 Conn. 215, 217; *State* vs. *Foord, supra*, 287.

In the third assignment of error the defendant claims that the court erred in failing to include all but one of the twenty-four paragraphs in his motion to correct the finding of subordinate facts. There is nothing in this submission that had not been adequately stated in the court's original and corrected finding. Furthermore, many of the findings requested rested on conflicting evidence or on the credibility of witnesses. Even though a fact testified to is not contradicted, that does not establish it as an admitted or undisputed fact, requiring its inclusion in the court's finding. *Walkinshaw* vs. *O'Brien*, 130 Conn. 151, 153; *Morse* vs. *Morse*, 128 Conn. 138, 139.

The foregoing observations apply with equal effect to dispose, with one exception, of the defendant's claims in paragraphs 4, 5, 6, and 8 of his assignment of errors. This exception, contained partly in assignment 5 and wholly in assignment

7, attempts to raise the constitutional issue of the defendant's right to counsel immediately on his apprehension and later detention by the police. In the last assignment referred to, it is also mistakenly asserted that the accused was deprived by such conduct on the part of the police of the opportunity of obtaining evidence by blood test or other means "which would have conclusively proven his innocence *(sic).*" There is nothing in the finding, the motion to correct, or the evidence that would tend to support that claim. At no time did the defendant ask for a medical examination or a chemical test to determine his state of sobriety or intoxication. He refused to submit himself to any of the so-called performance or physical tests used routinely by the police to reinforce their observations and the opinions drawn therefrom, as to condition of the defendant relative to intoxication. Such evidence is admissible. *State* vs. *Jones,* 124 Conn. 664, 668, 669. The defendant evidently confuses his own situation with that of a person arrested for operating a motor vehicle while under the influence of intoxicating liquor. General Statutes § 14-227a (5). The examination there provided is a statutory right, accompanied by corresponding duties. Such examination is not required either under the provisions or § 53-246, for the violation of which the accused was prosecuted and found guilty, or by any guarantee of the state or federal constitution. At best, the claim of the defendant amounts to this: *if* his attorney were present, he would have ordered a professional examination to establish his innocence. If the defendant wanted such examination he had only to ask for it. We cannot speculate as to what the results would have been if, indeed, he had requested such examination, as he had a right to do, at his own expense. The defendant gains nothing by this assignment.

At the trial the defendant made the claim of law that his rights under the sixth and fourteenth amendments to the consti-

tution of the United States were violated in that he was denied the right to counsel at the time of his examination and detention at the police station. He, thereupon, made a motion to dismiss the charge and the motion was denied.

In the latest reported case, *Miranda* vs. *Arizona*, 384 U.S. 436, 86 Sup. Ct. 1602, 16 L. Ed. 694, affirming the decision in *Escobedo* vs. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977, the rule enunciated by the Supreme Court of the United States, respecting right to counsel under the sixth amendment, made applicable to the states through the due process clause of the fourteenth amendment, made clear that the denial of counsel is inextricably linked with the rights against self-incrimination guaranteed under the fifth amendment. In *Miranda*, the majority of the court, speaking through Chief Justice Warren, said "That case *[Escobedo]* was but an explication of basic rights that are enshrined in our Constitution — that 'No person . . . shall be compelled in any criminal case to be a witness against himself,' and that 'the accused shall . . . have the Assistance of Counsel' — rights which were put in jeopardy in that case through official overbearing." *Id.*, 442. The majority decision further states: "The constitutional issue we decide in each of these cases is the *admissibility of statements* obtained from a defendant questioned while in custody and deprived of his freedom of action. In each, the defendant was questioned by police officers, detectives or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, *the questioning elicited oral admissions*, and in three of them, *signed statements as well which were admitted at their trials.* They all thus share features — incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating

statements without full warnings of constitutional rights." (Italics supplied). *Id.*, 445.

In the present case; it is found by the court and admitted by the defense, that, in the course of the early police questioning, the accused stated that he would answer questions if he could call a lawyer. His request was denied. Thereafter, all questioning ceased and in several minutes he went into a sound slumber from which he did not waken for several hours. He was then warned of his rights and obtained counsel. The early denial of the request to have counsel for the reason stated, under the circumstances of this case, was not a denial of the right to assistance of counsel under the sixth amendment. *Schmerber* vs. *California*, 384 U.S. 757, 765, 86 Sup. Ct. 1826, 16 L. Ed. 2d 908. The defendant at no time made any self-incriminating statements. He remained silent and confessed nothing. That was his right under the fifth amendment. Nothing that may have been uttered by him, that would have been inadmissible or objectionable, was offered in evidence on trial. Thus, neither under the *Escobedo* or *Miranda* decisions was the defendant deprived of his right to counsel so that the trial lacked the fundamental fairness essential to our concept of justice. He was convicted not by his own statements, admissions or confessions, compelled, enforced or extracted from him by force, trickery or inquisitorial methods. He was found guilty as a result of testimony of the ordinary, objective observations made by a police officer, of the defendant's conduct and behavior, which bore the indicia of his state or condition of intoxication. *Holt* vs. *United States*, 218 U.S. 245, 252-253, 31 Sup. Ct. 2, 54 L. Ed. 1021. *Schmerber* vs. *California, supra*, 760. The police were under a duty to make those observations and take such steps as the law dictated. They could not close their eyes on what they saw.

There is no error.

In this opinion JACOBS and LEVINE, Js., concurred.

The foregoing is a true copy of the original opinion as filed with the Chief Clerk of the Circuit Court, but the opinion is subject to alteration and addition by the Judges until printed in the Connecticut Circuit Court Reports.

ELLIOTT R. KATZ
Chief Clerk

STATE OF CONNECTICUT }
COUNTY OF NEW HAVEN } 1967

AFFIDAVIT

I, David M. Reilly, Jr., Attorney in the office of Messrs. Reilly and Peck, Attorneys for petitioner Mark F. Heller, hereby certify that a copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of Connecticut has been mailed deposition same in the United States Post Office, registered mail, postage prepaid to the Prosecuting Attorney for the Seventh Circuit Court at Meriden, Connecticut and to the Clerk of the Supreme Court of the State of Connecticut at Hartford, Connecticut.

DAVID M. REILLY, JR.

Subscribed and sworn to before me this ..... day of ...., 1967.

JOHN H. PECK
Commissioner of the Superior Court

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FILED
JUL 2 1957
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted] 115

MARK F. HELLER, *Petitioner*

vs.

STATE OF CONNECTICUT

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION

MILTON A. FEINMAN,
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THE MADE CO., MERIDEN, CONN.

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1338

MARK F. HELLER, *Petitioner*

vs.

STATE OF CONNECTICUT

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION

1. There Is No Conflict With The Decisions Of This Court.

The question presented is whether Petitioner was deprived of his right to counsel under the Sixth Amendment to the Constitution (Pet. 3) as applied to the states through the due process clause of the Fourteenth Amendment. (Pet. 2)

Following his arrest, the Petitioner answered no questions and made no statement to the police, but he remained silent. After his request to call a lawyer, questioning ceased and no statement by Petitioner was obtained from him or offered in trial. (Pet. A-7)

Petitioner claims the decision below is in conflict with the *Escobedo* and *Miranda* decisions. (Pet. 8 and 6) The majority decision in *Miranda* in explaining *Escobedo* clearly states that the constitutional issue in each of the cases pertained to the admissibility of self-incriminating statements obtained from a defendant questioned while in custody. (Pet. A-10-11) The Petitioner was *not* convicted by his own statement, confession or admission, because none was offered or admitted on trial. (Pet. A-11) Furthermore, this case was tried on December 10, 1964 (R. 1) which was prior to June 13, 1966, and is not controlled by *Miranda* according to the *Johnson* case. Petitioner was convicted solely upon the testimony of the police officer as to his observations of the Petitioner. (R. 7)

Petitioner was not denied his rights under the Sixth Amendment (Pet. 3) to have the assistance of counsel and compulsory process for obtaining witnesses in his favor, since at the trial he was represented by counsel and produced a witness who had been with him prior to his arrest to corroborate his own testimony. (Pet. 3)

The right to counsel under the Sixth Amendment while an accused is in police custody has not been extended to situations going beyond testimonial statements by an accused as is shown in the *Schmerber* case. Petitioner's argument is purely speculative as to what evidence he might have been able to produce if his lawyer had been called and if his lawyer had come to the station and assumes that Petitioner would have been awake when, in fact, he was asleep. (Pet. A-7)

CONCLUSION

Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,
MILTON A. FISHMAN,
Attorney for Respondent.

AFFIDAVIT

I, Milton A. Fishman, Prosecuting Attorney, Circuit Court of Connecticut, Seventh Circuit, Attorney for the respondent State of Connecticut, hereby certify that a copy of the foregoing Brief in Opposition has been mailed depositing same in the United States Post Office, registered mail, postage prepaid to Attorney David M. Reilly, Jr., 205 Church Street, New Haven, Connecticut.

MILTON A. FISHMAN

Subscribed and sworn to before me this 27th day of June, 1967.

DENNIS F. GAFFNEY,
Commissioner of the Superior Court.

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NOV 10 1967
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 115

MARK F. HELLER, *Petitioner*

vs.

STATE OF CONNECTICUT

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

PETITION FOR REHEARING

DAVID M. REILLY,
DAVID M. REILLY, JR.,
205 Church Street,
New Haven, Connecticut.
Attorneys for Petitioner.

THE HACK CO., NORTH HAVEN, CONN.

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1338

MARK F. HELLER, *Petitioner*

vs.

STATE OF CONNECTICUT

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

PETITION FOR REHEARING

PETITION FOR REHEARING ON PETITION FOR CERTIORARI

The petitioner, Mark Heller, prays for re-argument and upon the following grounds:

Petitioner was arrested upon charges that on their face amount to only a minor offense. The charge was being found drunk. It was disputed. The constitutional issue involved his right to immediately contact a lawyer. The statute involved permitted a 30 day jail sentence.

If a reaso for denying the petition for certiorari is that only a minor offense has been charged, and therefore the case lacks importance, the petitioner asks the court to reconsider. A *lettre de cachet* permitted an arrest for no crime at all.

Arrests on minor charges if permitted without some form of constitutional protection can shield those who would arrest under circumstances where there was no crime at all.

The court has previously decided there is no right to a jury trial for a minor crime.

Wherefore, the petitioner moves that the court reconsider this petition and declare that a person arrested has the right to immediately call his lawyer.

The Petitioner, MARK HELLER,
By DAVID M. REILLY,
DAVID M. REILLY, JR.,
His Attorneys.

AFFIDAVIT

STATE OF CONNECTICUT }
COUNTY OF NEW HAVEN } ss.: November 9, 1967

I, David M. Reilly, Jr. being duly sworn depose and say that I have mailed a copy of this Petition for Rehearing to the Prosecuting Attorney of the Seventh Circuit Court at Meriden, postage pre-paid.

DAVID M. REILLY, JR.

Subscribed and sworn to before me this 9th day of November, 1967.

CAROL STANFORD,
Notary Public.